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No. 93-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS, MISSOURI,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

By casting doubt on plaintiffs' facts,[1] ignoring the nature of their claim, and failing to recognize that different analytic frameworks are required for different electoral practices, Respondents' brief in opposition attempts to skirt the conflict between the lower courts' holding that "proportional representation" bars plaintiffs' challenge to St. Louis' single-member, multi-district electoral plan and the analytic framework evolved by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Rather than make this conflict go away, respondents' presentation highlights the need for this Court to clarify the analytic framework for proving a §2 challenge to a single-member, multi-district plan.

I. PETITIONER SHARON TYUS, AN AFRICAN AMERICAN REGISTERED VOTER AND RESIDENT OF THE CITY OF ST. LOUIS, HAS STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP.

As a threshold matter, respondents argue that Petitioners, including Petitioner Sharon Tyus, an African American

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[1] Respondents imply that petitioners misstate the facts, but decline to identify a single purported misstatement by hiding behind this Court's admonition in Rule 15.3 that a "brief in opposition shall be as short as possible." Their tactic contravenes the proviso of Supreme Court Rule 15.1 that respondents "address any perceived misstatement" not merely suggest one exists. In truth, there are no misstatements. The facts are detailed in an eleven page affidavit filed in opposition to respondents' summary judgment motion (App. 84-95) and in a more elaborate submission in support of plaintiffs' Rule 59(e) motion (App. 159-213). Both sets of papers and exhibits are part of the record on appeal. *See Foman v. Davis*, 371 U.S. 178, 181 (1962); *Figgie Intern, Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). These facts, as summarized in the petition (18-19, n. 13-15) were presented in virtually identical fashion in the briefs below. They were never addressed, let alone rebutted, by respondents or their expert. Indeed, respondents have argued from the very beginning, and the lower courts have accepted, the proposition that "proportional representation" renders plaintiffs' facts irrelevant.

registered voter and resident in the 98.9% African American majority 20th ward, lack standing to challenge St. Louis' race-based reapportionment plan under §2 of the Voting Rights Act.[2] (Respondents' Brief 7; hereinafter "RB"). According to respondents, the only African Americans to be harmed by the 1991 St. Louis reapportionment are those who have been fractured into wards with effective white majorities, i.e., African Americans in the 2nd, 6th, 7th, 8th, 17th and 28th wards (RB 7). Since Petitioner Tyus is not among the African Americans "fractured" into these specific wards, respondents argue, she lacks standing to challenge the 1991 map. Respondents' argument evinces a deliberately crabbed construction of plaintiffs' claims and a misunderstanding of the application of standing to voting rights claims.

Plaintiffs contend that the 1991 Ward map dilutes the voting power of African Americans generally, throughout St. Louis, and that its boundaries were manipulated to frustrate the electoral opportunities of a politically cohesive African American community (App. 9-10). Specifically, plaintiffs' claim that the 1991 ward boundaries were manipulated with the purpose and effect to "fracture," "pack," and reduce African American population in specific wards while maximizing the voting power of the white community (Petition, 18-19, n. 13-15). Petitioner Tyus stands as an individual victim of this dilutive effect since her ward's boundaries were drawn to "pack" herself and other African American voters into a ward where African Americans constitute an excessive majority (98.9%), thus wasting their votes and depriving them of any influence in other wards.

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[2] Respondents question the jurisdiction of this court over the Petitioners other than Petitioner Tyus. Without conceding their point, we note that respondents do not question this court's jurisdiction over Petitioner Tyus. As we explain, Petitioner Tyus has standing to pursue this matter alone.

Voinovich, 113 S.Ct. at 1155; *Shaw v. Reno*, 113 S.Ct. 2816, 2835, n.6 (1993) (White, J., dissenting). Furthermore, the impact of this boundary manipulation extends beyond her particular ward, because the configuration and racial composition of Ms. Tyus' ward necessarily impacts the configuration of other wards, particularly the contiguous second ward and nearby central corridor area. The "packing" of Ms. Tyus and other African Americans into the 20th ward at 98.9% was essential to respondents' efforts to contain African Americans in only 11 wards, or the fewest number possible.[3] As an African American resident and registered voter in one of St. Louis' "packed" wards, petitioner Tyus has suffered a distinct and palpable injury and she has standing to challenge the map. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 263 (1977).

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[3] Respondents incorrectly suggest that petitioners' claim that the 2nd Ward should not be treated as an African American ward and, therefore, that there are only 11 wards in which African Americans can elect their candidates of choice is at odds with their position below (RB 7). In fact, this is one of the "genuine issues of material fact . . . making this case wholly unsuited for summary judgment" (A-3, McMillin, J., dissenting). Plaintiffs *never* suggested that African Americans could elect their candidate of choice in the 2nd Ward. Indeed, they pointed out that in a recent bi-racial election the candidate supported by the white community defeated the candidate preferred by the African Americans (Petition, 5 n. 6). In fact, plaintiffs argued below that a thorough analysis of voting behavior was required before the 2nd Ward could be designated as an African American Ward. *See Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993); *Campbell v. Theodore*, 113 S.Ct. 2954 (1993) (Government's brief at 14 and 25; n. 11); Petition, 14 n. 9.

II. RESPONDENTS' ATTEMPT TO RECONCILE THE LOWER COURTS' DECISIONS WITH *GINGLES* AND *VOINOVICH* SERVES TO HIGHLIGHT THE NEED FOR THIS COURT TO CLARIFY THE ANALYTIC FRAMEWORK FOR §2 CHALLENGES TO SINGLE-MEMBER, MULTI-DISTRICT ELECTORAL PLANS.

The lower court's holding that "proportional representation" in the single-member, multi-district context bars a §2 claim[4] cannot be reconciled with the approach taken by this Court in *Gingles* and *Voinovich*. The lower courts' conclusion, derived from their reading of *Gingles*, is premised on the mistaken belief that the presence of "proportional representation" in a single-member plan is the sole and conclusive measure of vote dilution. In other words, proportional representation—and not equal opportunity—is the lode-star of the Voting Rights Act. Consequently, "proportional representation" serves as a ceiling quota on African American representation, and the courts are free to turn a blind eye to

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[4] Respondents take issue with petitioners' assertion that the lower court's opinions treat "proportional representation" as a complete bar to single-member, multi-district claims because "the courts below recognized the special circumstances exception but concluded that plaintiffs had failed to point out any such circumstances" (RB 8). Respondents are only half right. The lower courts paid lip service to the "special circumstances" exception, but did not share their analysis of its application to single-member plans. The lower courts clearly rejected "boundary manipulations" that "fracture," "pack" or "reduce minority population" as special circumstances that explain why, in a single-member plan, proportional representation does not accurately reflect African American voting power (See Petition, 10 n. 16). Instead, the court must have accepted respondents' argument that only the factors identified by this Court in *Gingles*, 478 U.S. 57, n. 25, could qualify. Since the examples of special circumstances identified in *Gingles* are relevant only in the multi-member district context, the effect of the lower courts' ruling is to eliminate the "special circumstance" exception in the single-member, multi-district context and to make "proportional representation" an absolute bar.

discriminatory devices used to accomplish that bottom line. This conclusion is totally inconsistent with the analytic framework for voting rights claims articulated by this Court.

Vote dilution has been consistently defined by this Court as the "impermissible discriminatory effect that a multi-member or other districting plan has when it operates to 'cancel out or minimize the voting strength of racial groups.' " *Gingles*, 478 U.S. at 87 (O'Connor, J. concurring), *quoting White v. Registar*, 412 U.S. 755, 765 (1973). In addition to the "submergence" of minority voters through the use of a multi-member district mechanism, vote dilution may also occur through the manipulation of district boundaries. As Justice O'Connor noted in her concurrence in *Gingles*, 478 U.S. at 87, in a single-member district context, "the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice." Indeed, "in the context of single-member districts, the usual devise for diluting minority voting power is the manipulation of district lines." *Voinovich*, 113 S.Ct. at 1155. Neither the use of the multi-member districting scheme, nor the manipulation of single-member district lines, is *per se*, illegal. When, however, either device operates unequally to cancel out or minimize the voting strength of a racial group it has caused the impermissible discriminatory racial effect of "vote dilution."

According to this Court, in the single-member district context, the discriminatory effects that can be caused by boundary manipulation include "fracturing" and "packing." "Fracturing" occurs when

> a politically cohesive minority group that is large enough to constitute the majority in a single-member district [is] divid[ed] . . . among various districts so

> that it is a majority in none . . . [and] the majority in each votes as a bloc against the minority candidate.

Voinovich, 113 S.Ct. at 1155. "Packing" occurs when African American population, that could form an effective majority in a number of districts is "concentrated . . . into [fewer] districts where they constitute an excessive majority." *Ibid.* "Packing" and "fracturing" are not mere "devises" that can cause dilution (RB 8). They are the very essence of vote dilution. Put differently, boundary manipulation is a *device* for diluting minority vote, "fracturing" and "packing" define the discriminatory or dilutive effect.[5]

Fundamental to Respondents', and the lower courts', mechanical application of the *Gingles*' analysis is the con-

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[5] Respondents suggest that this analysis is "self-contradicting" because there are always some voters who will be packed and some who will be fractured (RB 9-10). They miss the point. Of course, any single-member, multi-district plan can result in some minority persons being in a ward where they are not part of an effective majority or in a ward in which more minority persons reside than is necessary to elect candidates of their choice. In voting rights' jurisprudence, however, that alone is neither "fracturing" nor "packing." It becomes "fracturing" or "packing" only when all of the *Voinovich* conditions are met. 113 S.Ct. at 1155. In addition, plaintiffs challenging boundary manipulations in a single-member plan may be required to show that (a) the boundary manipulations impact unequally on the "opportunities enjoyed by black and white voters" *see Voinovich*, 113 S.Ct. at 1155, and/or (b) the claim would not result in another group's underrepresentation in comparison to its total population. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 163 (1977).

Moreover, drawing wards that do not "fracture" or "pack" a particular racial group does not "necessarily mean[ ] that voters of [that] particular race will control the maximum number of wards that their numbers permit" (RB 9). It means that no racial group can maximize its voting strength at the expense of another group.

clusion that, in the single-member multi-district context, proportional representation will serve as an adequate proxy for a minority group's equal opportunity to elect the candidates of its choice. This proposition is factually incorrect. As plaintiffs' evidence shows, the 1991 St. Louis map simultaneously provides for near "proportional representation" measured by voting-age population, while flagrantly diluting African American voting strength. *See also*, Petition 15-17. More importantly, "proportional representation" has never been treated by this Court as a "fourth precondition" that would obviate the need for the searching "totality of the circumstances" analysis demanded by Section 2. As Justice O'Connor made clear:

> I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a §2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, *on the totality of the circumstances*, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice.

478 U.S. at 104 (Emphasis added).

III. THE LOWER COURTS' CONCLUSION THAT PROPORTIONAL REPRESENTATION BARS A §2 INTENT CLAIM CONFLICTS WITH THE RULINGS OF THIS COURT AND THE SEVENTH CIRCUIT.

Respondents attempt to reconcile the lower courts' treatment of plaintiffs' §2 "intent" claim with the holdings of this Court and other circuits turns on the same disregard for plaintiffs' factual claim and misunderstanding of "proportional representation" that undermines their discussion of plaintiffs' "results" claim. Plaintiffs' uncontroverted evi-

dence establishes that the boundaries of the 1991 St. Louis ward map were purposefully manipulated to dilute African American voting strength. In direct conflict with *Shaw v. Reno, supra,* the lower courts hold that a voting practice which was adopted with a discriminatory purpose (Petition, 24 and n. 18) and which has the effect of diluting minority voting strength (*Id.* at 18-19, and n. 13-15) is nevertheless immune from challenge because the African American plaintiffs have "proportional representation" measured by voting-age population. This holding also conflicts with the Seventh Circuit's analysis in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359-60 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993). Even if the lower courts were correct in their holding that a "bottom line" of proportional representation precluded a §2 "effects" claim, plaintiffs' claims of systematic "fracturing" and "packing" would still provide evidence of intentional discrimination "along the way." *Baird*, 976 F.2d at 359-60. If the "results" test is to become nothing more than a test of whether or not "proportional representation" has been achieved—as the lower courts seem to conclude—then this Court's holdings over the past three decades demand that a claim of intentional discrimination remain available to plaintiffs who can make a more particularized showing of purposeful discrimination in the drawing of particular districts.

IV. THE CONFUSION AMONG THREE-JUDGE DISTRICT COURTS CONCERNING THE PROPER POPULATION MEASURE FOR DETERMINING PROPORTIONAL REPRESENTATION NEEDS CLARIFICATION.

Respondents do not deny that the lower courts use of voting-age population as the measure of proportional representation is directly at odds with this Court's use of total population as the proper measure in both *Gingles* (478 U.S.

at 74-77 and n. 35, and 104) and *United Jewish Organization* (432 U.S. at 166). Nor do they deny that the lower courts are in disagreement over the proper population measure. Instead, respondents suggest that (a) the confusion involves district courts and, therefore, is not appropriate for certiorari, and (b) this Court's recent opinion in *Growe*, 113 S.Ct. at 1083 n. 4, suggests that voting-age population is the "superior measure" (RB 12).

Respondents conveniently overlook the fact that this confusion is, with the exception of *Barnett v. Daley*, 835 F.Supp. 1063 (N.D.Ill. 1993), among three-judge district courts whose judgments are final in the absence of Supreme Court review. Three-judge courts hear all §2 challenges to Congressional and state-wide reapportionments. The appropriateness for resolving conflicts among three-judge courts is every bit as great as is the resolving of conflicts among Circuit Courts of Appeal.

Respondents reference to *Growe* highlights the confusion that needs this Court's attention. The issue in *Growe*, as well as the cases cited therein (113 S.Ct. at 1083 n. 4), has nothing to do with the issue of "proportional representation." It concerns the question of which racial or ethnic group, if any, has sufficient population to elect its candidates of choice in a specific district. Everyone agrees that St. Louis reapportioned on the basis of total population. Because total population provides the basis for redistricting, total population also serves as the yardstick for measuring proportional representation. Both the Voting Rights Act and the legislative history to the 1982 amendments to §2 define proportional representation in terms of "population" (Petition 27-28).

Although total population provides the basis for reapportionment and the yardstick by which to measure proportional representation, total population does not, by itself,

tell us whether or not such proportional electoral success *can in fact be achieved* in a single-member district plan. The factual determination regarding which racial or ethnic group, if any, can achieve electoral success within a ward begins with the total population figures for each group within each ward. However, it cannot end there. To determine a group's potential electoral success, a court must conduct a searching analysis that includes not only voting-age figures, but also registration data, turnout data, incumbency situation, political cohesion, racial bloc voting and socio-economic factors. Thus, in *Campbell v. Theodore, supra*, this Court vacated and remanded for reconsideration the trial court's identification of African American opportunity districts as any district with a 55% African American voting-age majority in light of the Government's position that there must be an in-depth analysis of each district that *begins with voting-age population* and includes expert analysis of the extent of the voting polarization as well as "historical voting patterns and election results" (R. 129, Exh. C at 14-15, 11). *See also Growe*, 113 S.Ct. at 1084.

It is only in this context of determining which racial group, if any, has an "effective" majority that "voting-age" population becomes the more "meaningful" population figure.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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